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18 IN RE HEWLETT-PACKARD COMPANY  
19 SHAREHOLDER DERIVATIVE LITIGATION

20 This Document Relates to: All Actions

21 Master File No. 12-CV-6003 CRB

22 **HEWLETT-PACKARD'S  
MEMORANDUM IN SUPPORT OF  
PRELIMINARY APPROVAL OF THE  
SETTLEMENT AND IN OPPOSITION  
TO THE MOTIONS TO INTERVENE  
AND SEVER**

23 Dept.: Courtroom 6, 17th Floor  
24 Judge: Hon. Charles R. Breyer

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## **SUMMARY OF ARGUMENT**

The question presented by this motion is straightforward: whether “the settlement of the claims on the agreed upon terms is ‘within the *range* of possible approval.’” *In re NVIDIA Corp. Deriv. Litig.*, No. C-06-06110, 2008 WL 5382544, at \*2 (N.D. Cal. Dec. 22, 2008) (emphasis added and citation omitted). And because the parties made clear at the August 25, 2014 hearing that the proposed settlement is not contingent upon the payment of attorneys’ fees, the Court’s preliminary evaluation must turn upon the settlement’s two principal elements: (1) the release to be granted to HP’s directors, officers, and outside advisors, and (2) the proposed corporate governance reforms to be effected at HP. Both elements of the settlement are not only “within the range of possible approval” but are in the best interests of the corporation and its shareholders. The settlement warrants preliminary approval.<sup>1</sup>

The release is appropriate because the claims against HP's current and former officers and directors should not and would not succeed. An independent committee of the HP board, the Demand Review Committee ("DRC"), conducted an exhaustive investigation of the circumstances surrounding HP's acquisition of Autonomy. The DRC was led by a prominent and respected activist investor, and was assisted by independent law firms and numerous financial, accounting, and forensic experts. The DRC's lawyers collected documents from and reviewed databases containing 17.5 million electronic files. Wolinsky Decl. Ex. 1 at 16 ("DRC Resolution"). They interviewed over 90 people—everyone who had any significant knowledge of the deal who would speak to them—and reached out to Autonomy's former CEO, Michael Lynch, who declined to be interviewed. *Id.* at 16, 41. The DRC's lawyers and experts devoted some 50,000 hours of work to find out anything and everything about the Autonomy transaction (*id.* at 16)—to learn exactly what happened, and to find out who was responsible.

What they found was a massive fraud. A sophisticated but brazen scheme of deception, or-

<sup>1</sup> After the August 25, 2014 hearing, plaintiffs and HP sought to mediate plaintiffs' claims for attorney's fees based on their contribution to the corporate governance reforms that are part of the settlement. At the conclusion of the mediation, plaintiffs and HP agreed to submit the matter of plaintiffs' entitlement to attorneys' fees and expenses to binding arbitration by retired U.S. District Court Judge Vaughn R. Walker, subject to the review and approval of the Court. Amended and Restated Stipulation of Settlement at 35 (Docket No. 201).

1 chestrated by the senior management of Autonomy, that had inflated revenues in Autonomy's  
 2 publicly filed financial statements for many years, creating the false appearance of a high growth  
 3 company that was meeting or beating Street estimates through phony software deals and loss-making  
 4 hardware sales misclassified as software sales. The effect of the fraud was to inflate Autonomy's  
 5 revenues by 21.1% in 2009, 29.6% in 2010, and 26.4% in the first half of 2011. *Id.* at 24-25, 63-64,  
 6 67, 87-89.

7 What the DRC also found was extensive and extraordinary evidence of deceit. One particu-  
 8 larly revealing example is this email sent by the former Autonomy CFO (and would-be intervenor  
 9 here) Sushovan Hussain near the end of Autonomy's 2010 fiscal year to his boss, former Autonomy  
 10 CEO Michael Lynch.<sup>2</sup> The subject is "Us idol"—a reference to the anticipated revenues from the  
 11 sale of Autonomy's principal software product, IDOL, in its major market, the United States. The  
 12 email reflects a CFO in panic:

13  
 14 From: Sushovan Hussain [sushovanh@autonomy.com]  
 15 Sent: Friday, December 10, 2010 1:19 AM  
 16 To: Mike Lynch  
 17 Subject: Us idol  
 18  
 19 Really don't know what to do mike. As I guessed revenue fell away completely yet SMS report  
 20 shows massive activity. But I speak with the vp's who are far more accurate. Also stouff,  
 21 Joel and mike I think keep separate sheets and unless I am v wrong don't discuss the sheets  
 22 hence plane crashes and they don't know. We've covered up with bofa and hopefully db and Doi  
 23 but if latter 2 don't happen it's totally bad. There are swathes of reps with nothing to do  
 24 maybe chase imaginary deals.  
 25 So radical action is required, really radical, we can't wait any more.  
 26 Everywhere I look at us idol it's bad.  
 27 Sent from my iPhone

28 As Hussain's email describes, the revenue outlook was "totally bad," a financial "plane  
 29 crash[]" waiting to happen. As "revenue fell away," Hussain and Lynch "covered up." Sales reps  
 30 were chasing "imaginary deals" creating the appearance of "massive activity" where there in fact  
 31 was little or none. Hussain couldn't keep the game going much longer—couldn't "wait any more."  
 32 He "[r]eally didn't know what to do mike." But Mike Lynch did. He would take "radical action ...

2 Wolinsky Decl. Ex. 2.

1 really radical,” as Hussain so plaintively urged. He would sell the company, ultimately to HP.

2 As the DRC found, in the due diligence that led up to the sale, HP asked the right questions.  
 3 The problem was that HP received false answers—repeatedly. HP and its accounting, financial, and  
 4 legal advisors reviewed non-public documents in an electronic data room, participated in at least 28  
 5 due-diligence conference calls, and pored over publicly-filed Autonomy annual financial statements  
 6 that had been audited by Deloitte UK, as well as quarterly financial statements that had been  
 7 reviewed by Deloitte UK. DRC Resolution at 31, 34. The investigation concluded that HP’s  
 8 officers and directors “engaged in a reasonable process for acquiring Autonomy and managing it  
 9 after the Acquisition”; “were guided by reasonable judgments based upon assumptions and estimates  
 10 that appeared reasonable” and “reasonably relied on all reasonably available information before  
 11 making decisions.” Given all this, the DRC found that there was simply no basis, under the  
 12 applicable standards of Delaware law, for suing the victims of the fraud perpetrated by Autonomy  
 13 executives. *Id.* at 51-52.

14 So if this action were not to settle, and were litigated instead, HP would move to dismiss it  
 15 under a fundamental principle of Delaware law: that a board of directors has the statutory authority  
 16 to manage the business and affairs of the corporation, including the authority to decide whether  
 17 assertion of a claim by the company is in the best interests of the company and its shareholders.  
 18 Here, HP’s independent board, after considering the results of the DRC’s investigation, has  
 19 concluded that prosecution of this action on behalf of HP would not be in the corporation’s best  
 20 interests. The board has decided that the claims against HP’s directors, officers and advisors lack  
 21 merit under applicable Delaware law, and that those responsible for perpetrating the fraud should be  
 22 sued. Wolinsky Decl. Ex. 3 at 6-11 (“Board Resolution”). On the basis of that decision, HP would  
 23 move to dismiss here.

24 And on that motion, given the unquestionable independence and disinterestedness of the  
 25 DRC and of the board, the “*only* relevant question” before the Court would be one of process:  
 26 whether, in deciding not to prosecute this action, the “directors acted in an informed manner and  
 27 with due care, and in a good faith belief that their action was in the best interests of the corporation.”

28 *Copeland v. Lane*, No. 5:11-cv-01508 EJD, 2012 WL 4845636, at \*5 (N.D. Cal. Oct. 10, 2012)

1 (emphasis added); *Scattered Corp. v. Chicago Stock Exch.*, 701 A.2d 70, 75-77 (Del. 1997). The  
 2 Court would not be required, or even authorized, to evaluate the substance of the board's decision.  
 3 The Court would only ask whether the DRC's "investigation ... was reasonable and conducted in  
 4 good faith." *Scattered*, 701 A.2d at 77. If the answer to that question is "yes," the board's decision  
 5 to terminate this action would be protected by the business judgment rule.

6 Even apart from the board's protected decision not to do so, prosecuting this action would  
 7 produce huge corporate expenditures with virtually no prospect of any return. As permitted by  
 8 Section 102(b)(7) of the Delaware General Corporation Law, HP's corporate charter contains an  
 9 exculpation provision that effectively bars claims against directors based on the duty of care.  
 10 Accordingly, to recover from the directors on the claims asserted here, plaintiff would have to prove  
 11 that they breached their duty of loyalty. That is a highly unlikely prospect. None of the directors  
 12 had any personal or financial interest in Autonomy, and none is alleged to have "fail[ed] to act in the  
 13 face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities."  
 14 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

15 Under Section 141(e) of the Delaware statute, moreover, directors are "fully protected in  
 16 relying in good faith" on the company's officers and advisors. *See, e.g., Brehm v. Eisner*, 746 A.2d  
 17 244, 261-62 (Del. 2000). The board retained some of the most accomplished advisors in the country  
 18 and in good faith relied on them and HP's officers in evaluating the Autonomy deal.

19 And as for the officers, although these protections do not apply, recovery would still be  
 20 exceedingly difficult: to prevail against them, plaintiff would need to prove that the officers took  
 21 actions "which [were] without the bounds of reason," *Midland Grange No. 27 Patrons of Husbandry*  
 22 v. *Walls*, No. 2155-VCN, 2008 WL 616239, at \*9 (Del. Ch. Feb. 28, 2008), and were "so grossly  
 23 off-the-mark as to amount to reckless indifference or a gross abuse of discretion," *Metro. Life Ins.*  
 24 Co. v. *Tremont Grp. Holdings, Inc.*, No. 7092-VCP, 2012 WL 6632681, at \*7 (Del. Ch. Dec. 20,  
 25 2012); *Solash v. Telex Corp.*, No. 9518, 1988 WL 3587, at \*9 (Del. Ch. Jan. 19, 1988). There was  
 26 nothing like that here, and hence little prospect of recovery here.

27 At the same time, if HP were to pursue these claims, it would have to pay for the defendants'  
 28 defense under the advancement and indemnification provisions of HP's charter and bylaws. That

1 could easily cost the company tens of millions of dollars. And an even greater cost to the company  
 2 would be the distraction that this litigation would create to a board and management team that has  
 3 presided over a 300% increase in stock price since the announcement of the Autonomy write-down.

4 In short, this case would go nowhere if it were litigated. It would be expensive if it were  
 5 litigated. And it would distract the company from its central goal of creating value for shareholders.

6 That makes the proposed settlement fair by any standard. By virtue of the second principal  
 7 element of the settlement, the company and its shareholders would be getting much more than they  
 8 could expect to get if the case were litigated: the settlement provides for extensive corporate  
 9 governance reforms crafted with the input of counsel for the plaintiffs and their experts. This Court  
 10 and many others have consistently “recognized that corporate governance reforms … provide  
 11 valuable benefits’ to corporations and their shareholders.” *Wixon v. Wyndham Resort Dev. Corp.*,  
 12 No. C 07-2361 JSW, 2010 WL 3630124, at \*3 (quoting *NVIDIA*, 2008 WL 5382544, at \*3). As a  
 13 result, in cases like this one, courts have routinely approved settlements providing for corporate  
 14 governance reforms without monetary relief. “The proposed settlement provides for immediate  
 15 changes and relief, and it ‘eliminates [the] risks of continued litigation, including the very real risk of  
 16 no recovery after several years of litigation.’” *Wixon*, 2010 WL 3630124, at \*3 (quoting *NVIDIA*,  
 17 2008 WL 5382544, at \*3). Accordingly, as demonstrated more fully below, there is more than  
 18 ample grounds to conclude, on a preliminary basis, that the proposed settlement is within the range  
 19 of possible approval.

20 Finally, the pending motions to intervene by Rodney Cook and Hussain, and the pending  
 21 *Steinberg* motion to sever, should be denied. Cook’s and Steinberg’s motions should be denied on  
 22 the simple and well-trodden ground that a shareholder unhappy with the terms of a settlement does  
 23 not need to bring his or her own claims in order to protect his or her interests. Those interests can be  
 24 fully protected by objecting to the settlement. Even if the Court were to assume that Hussain is a  
 25 shareholder, something that his papers do not establish, Hussain’s motion should be denied for the  
 26 same reason, and two others: (1) Hussain failed to identify any claim that he actually intends to  
 27 pursue, let alone submit a proposed pleading in intervention as Rule 24(c) requires; and (2) his  
 28 interests—as a principal architect of the fraud against HP who is being criminally investigated and is

1 about to be sued by HP—are obviously *antagonistic* to those of HP and its shareholders. Indeed,  
2 Hussain is the *last* person this Court should hear from in deciding whether the proposed settlement is  
3 in the best interests of the company.

4 **STATEMENT OF ISSUES TO BE DECIDED**

5 1. Whether the proposed settlement, which provides for valuable corporate governance  
6 revisions and which releases claims that an independent and disinterested committee of the HP board  
7 determined to be meritless following a reasonable and thorough investigation, is “within the range of  
8 possible approval” and therefore should be preliminarily approved?

9 2. Whether purported HP shareholders Rodney Cook, Harriet Steinberg, and Edward Vogel  
10 should object rather than intervene (Cook) or have their case severed (Steinberg and Vogel) if they  
11 seek only to litigate claims that the proposed settlement would release—and therefore effectively  
12 seek to challenge the terms of the proposed settlement?

13 3. Whether Sushovan Hussain, one of the architects of the fraud at Autonomy, should be  
14 permitted to intervene notwithstanding his failure to submit a proposed pleading in violation of the  
15 Federal Rules, his failure to prove that he is an HP shareholder, and his conflict of interest with HP  
16 and its shareholders?

## ARGUMENT

## **I. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED.**

“[T]he provision [of the Federal Rules] requiring notice and court approval of [derivative] settlements ... [is] intended to prevent shareholders from suing in place of the corporation in circumstances where the action would disserve the legitimate interests of the company or its shareholders.” *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984).

“The general practice is that once a[] [settlement] agreement has been reached by the parties, it is submitted to the court .... The court then will schedule a hearing, issuing an order to show cause why the suggested disposition should not be accepted, and direct that notice be given to absent shareholders ....” CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, & ADAM N. STEINMAN, 7C FEDERAL PRACTICE AND PROCEDURE § 1839 (3d ed. 2014). For the Court to grant preliminary approval and schedule that hearing, the Court “need *only* conclude that the settlement of the claims on the agreed upon terms is ‘*within the range of possible approval.*’” *In re NVIDIA Corp. Deriv. Litig.*, No. C-06-06110, 2008 WL 5382544, at \*2 (N.D. Cal. Dec. 22, 2008) (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41, at 237 (1995)) (emphasis added).

It is only at the final approval hearing that the Court considers objections from shareholders. Even then, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits,” and “[n]either the trial court nor [the appellate] court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute,” largely because of “the very uncertainty of the outcome in litigation … that induces consensual settlements” in the first place. *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Rather, counsel’s view that the settlement is in the best interest of the company’s shareholders is entitled to significant weight. See *id.*; *NVIDIA*, 2008 WL 5382544, at \*4.<sup>3</sup>

<sup>3</sup> Hussain misrepresented both the standard for preliminary approval and Judge Walker's opinion in *In re Oracle Securities Litigation*, 829 F. Supp. 1176 (N.D. Cal. 1993). Contrary to Hussain's repeated assertions at the Preliminary Approval Hearing, see Hearing Tr. (Aug. 25, 2014), 39:11-25, Judge Walker was not applying the standard for preliminary approval of a settlement in *Oracle Securities*; he was applying the standard for final approval, given that

1       Here, the proposed settlement plainly meets the standard for preliminary approval. The  
 2 proposed settlement consists of two principal elements: first, a release of claims against various  
 3 officers, directors and advisors; and second, corporate governance reforms. The release is fair for  
 4 the simple reason that, if this action were to proceed, the claims against the proposed releasees  
 5 would almost surely be dismissed. And the corporate governance reforms are plainly valuable. The  
 6 settlement is in the best interests of the company and its shareholders, and it is certainly within the  
 7 range of possible approval. The Court should grant preliminary approval.

8           **A.     The Proposed Release Is Appropriate.**

9       The release is appropriate because, if this case does not settle, HP would make a motion to  
 10 dismiss that, under settled law, should be granted. As a result, the claims being settled have no value  
 11 to HP or its shareholders.

12      As an initial matter, there is no basis for demonstrating demand futility in this action. *Ash v.*  
 13 *McCall*, No. 17132, 2000 WL 1370341 (Del. Ch. Sept. 15, 2000). The “mere threat of personal  
 14 liability for approving a questioned transaction, standing alone, is insufficient to challenge either the  
 15 independence or disinterestedness of directors,” and thus to establish demand futility. *Aronson v.*  
 16 *Lewis*, 473 A.2d 805, 815 (Del. 1984).

17      But more importantly, the HP board in fact acted on the demands that it did receive and has  
 18 resolved not to prosecute the claims asserted in the complaint in this action, as well as in the other  
 19 actions that have been filed relating to the same subject matter, and to seek the dismissal of those  
 20 claims if the case is not settled. On a motion to dismiss made on the basis of this decision, the issue  
 21 for the Court to decide would be one of process: not whether the board’s decision was a good one,  
 22 but whether, in deciding not to prosecute the claims, the independent and disinterested “directors  
 23 acted in an informed manner and with due care, and in a good faith belief that their action was in the  
 24 best interest of the corporation.” *Copeland v. Lane*, No. 5:11-cv-01508 EJD, 2012 WL 4845636, at

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25  
 26 notice had already been disseminated to class members. *See In re Oracle Securities Litig.*, No 3:90-cv-00931-VRW  
 27 (N.D. Cal. Feb. 3, 1993) (Docket No. 266) (“ORDER by Judge Vaughn R. Walker certifying settlement class, approving  
 28 notice of proposed settlements, and setting settlement hearing Date Entered: 2/2/93) (cc: all counsel) (cg, COURT  
 STAFF) (Entered: 02/03/1993”).

1 \*5 (N.D. Cal. Oct. 10, 2012) (emphasis added). Because HP’s independent board relied on the  
 2 thorough investigation of its independent committee, the Court would only ask whether the  
 3 committee’s “investigation … was reasonable and conducted in good faith.” *Scattered Corp.* v.  
 4 *Chicago Stock Exch.*, 701 A.2d 70, 75-77 (Del. 1997).

5 “The decision to bring a law suit or to refrain from litigating a claim is a decision concerning  
 6 the management of the corporation,” and, “[c]onsequently, such decisions are part of the  
 7 responsibility of the board of directors.” *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990). A  
 8 board’s decision to terminate litigation is thus presumptively valid under the business judgment rule:  
 9 “Courts give deference to directors’ decisions reached by a proper process, and do not apply an  
 10 objective reasonableness test in such a case to examine the wisdom of the decision itself.” *Brazen v.*  
 11 *Bell Atl. Corp.*, 695 A.2d 43, 49 (Del. 1997).

12 There was just such a proper process here—an extraordinarily careful and thorough one.

13           **1. An Independent Demand Review Committee of the Board Conducted an**  
 14 **Extensive Investigation into Plaintiff’s Allegations.**

15 In response to the various derivative actions, including this one, and to demands by other  
 16 shareholders, the HP board resolved in January 2013 to create the Demand Review Committee, a  
 17 committee of three independent non-executive members of the board, to assess potential Autonomy-  
 18 related claims.<sup>4</sup> The DRC was tasked with investigating, reviewing and evaluating the facts and  
 19 circumstances alleged in the derivative actions and demand letters and making a recommendation to  
 20 the board on whether HP should prosecute any of the potential claims. Board Resolution at 2. The  
 21 central operating principle for the DRC’s investigation and recommendation was whether the pursuit  
 22 of any such claims would be in the best interests of HP. DRC Resolution at 1.

23 The independence of the DRC is beyond serious contention. The members of the DRC at the  
 24 time the DRC completed its work and made its recommendations to the board were Ralph  
 25 Whitworth, Gary Reiner and Robert Bennett. Board Resolution at 2. All three are independent  
 26 directors; none is, or has ever been, an officer of HP. And none of the DRC members has been

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27           <sup>4</sup> Board Resolution at 2; DRC Resolution at 9-10.  
 28

1 substantively implicated in any alleged wrongdoing. Bennett did not even join the HP board until  
 2 July 2013, long after the complaint was filed. DRC Resolution at 10. Whitworth, the Chair of the  
 3 DRC, was not a member of the board at the time of the Autonomy acquisition. *Id.*; *see also* Compl.  
 4 ¶ 47 (Docket No. 75-2). His experience and expertise in corporate governance is extensive. He is  
 5 the co-founder and principal of Relational Investors, LLC, a registered investment advisor which  
 6 holds some 30 million shares, more than 1.6% of HP's outstanding stock. His interests are clearly  
 7 aligned with those of HP's other public shareholders.

8 Pursuant to the authority delegated to it by the board, the DRC retained its own counsel in the  
 9 United States and the United Kingdom and other professional advisors, including financial,  
 10 accounting and forensic experts, to assist in its review. DRC Resolution at 13. With the assistance  
 11 of these advisors, the DRC engaged in a year-long evaluation that entailed:

- 12 ➤ Twelve formal DRC meetings to discuss the status of the investigation, the work being  
     done by the committee's advisors and other issues related to potential claims;
- 13 ➤ The collection of documents and the review by the committee's counsel of relevant doc-  
     uments from databases containing more than 17.5 million electronic files;
- 14 ➤ Interviews by the committee's counsel of more than 90 individuals, including current and  
     former employees, officers and directors of HP and Autonomy, and various advisors to  
     HP and Autonomy on relevant issues;
- 15 ➤ Approximately 34,000 hours spent by the committee's counsel on the review of docu-  
     ments, witness interviews and analyses of legal, insurance, indemnity, valuation and  
     business issues relevant to the committee's mandate; and
- 16 ➤ More than 16,000 hours of work by experts and consultants retained to advise on ac-  
     counting principles, economic analyses, and Delaware and English legal issues and  
     standards.

17 DRC Resolution at 16-17. Counsel for the DRC invited and heard from 13 plaintiffs' law firms rep-  
 18 resenting HP shareholders in various derivative actions and demand letters. *Id.* at 15. In addition,  
 19 the DRC sought to interview Sushovan Hussain and Michael Lynch. Both refused the invitation.

20 This investigation and assessment enabled the DRC to evaluate the merits of the claims, the  
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1 availability and implications of insurance coverage, director-exculpation and indemnification  
 2 obligations, and various business and prudential considerations—all to determine whether HP's  
 3 interests would be best served by pursuing any relevant claims, and if so which. *Id.* at 17-21.

4 The DRC found that HP's officers and directors had acted in good faith and that HP had no  
 5 claim against them. As summarized in the resolution reflecting the DRC's findings, HP's directors  
 6 and officers "engaged in a reasonable process for acquiring Autonomy and managing it after the  
 7 Acquisition[,] ... were guided by reasonable business judgments based upon assumptions and  
 8 estimates that appeared reasonable at the relevant time ... [and] reasonably relied on all reasonably  
 9 available material information before making decisions." *Id.* at 51.<sup>5</sup>

10 The DRC also found that HP's directors and officers:

- 11 ➤ "did act with reasonable care and informed themselves of all reasonably available materi-  
   12       al information before making decisions";
- 13 ➤ "did seek to obtain (and did in fact obtain) value for corporate expenditures";
- 14 ➤ "did act in good faith and in a manner intended to promote the Company's best[] inter-  
   15       ests";
- 16 ➤ "did not engage in any so-called abuse of control," "receive any improper personal bene-  
   17       fit" or "act in [their] own self-interest";
- 18 ➤ "did not act in bad faith, with a conscious disregard of their responsibilities, or in further-  
   19       ance of their personal interests"; and
- 20 ➤ did not breach their fiduciary duties or knowingly (or even negligently) make any misrep-  
   21       resentations in connection with the Autonomy acquisition. *Id.* at 51-52.

22 The DRC also confirmed that HP's board worked to keep itself well-informed throughout the  
 23 diligence and negotiation process for the Autonomy acquisition. The board had met several times in  
 24 July and August 2011 to consider the Autonomy acquisition and received presentations from HP's  
 25 management and advisors on key due-diligence findings and the negotiation process. *Id.* at 34-35.

26 The DRC found that the board had not been presented with any "red flags"—there was absolutely no

27       <sup>5</sup> The findings and recommendations regarding HP's officers and directors excluded Lynch. See, e.g., *id.* at 52.  
 28

1 indication that Autonomy executives might have been committing a fraud; indeed, the board was  
 2 informed that KPMG's accounting review, including a due diligence call with Deloitte UK, had  
 3 presented "no material issues." *Id.* The DRC also found that HP's directors are "exculpated from  
 4 financial liability" for breaches of the duty of care "to the fullest extent consistent with Del. G. Corp.  
 5 L. § 102(b)(7)," and had "relied on, in appropriate circumstances, information, opinions, reports, or  
 6 other statements" prepared by HP officers and employees and independent experts and advisors that  
 7 the directors "reasonably believed to be reliable and competent regarding the relevant issues." *Id.* at  
 8 83-84. As a result, for these additional reasons, the DRC determined there is "no merit" to any of  
 9 the potential Autonomy-related claims against HP's directors.

10 Based upon all of these considerations, the DRC recommended that "no claims be pursued as  
 11 to present and former HP officers and directors." *Id.* at 47-52.<sup>6</sup> Beyond all this, the DRC also  
 12 considered that the company would have to fund defense costs and that litigation would result in  
 13 significant distraction, to the detriment of the company and its shareholders. *Id.* at 49-51.

14 The DRC also found that HP had been defrauded by Autonomy executives. The DRC  
 15 determined that "Autonomy's financial statements made significant and material  
 16 misrepresentations." *Id.* at 36. It further found that Lynch and Hussain had engaged in fraud, deceit  
 17 and/or negligent misrepresentation and that there were meritorious claims against Deloitte UK for  
 18 professional negligence or malpractice. *Id.* at 87-88. On the basis of those findings, and upon  
 19 considering other relevant factors, the DRC recommended that claims be pursued against Lynch,  
 20 Hussain and Deloitte UK. *Id.* at 63-64, 67.

21 Although a major focus of lead plaintiff's complaint is claims related to HP's pre-acquisition  
 22 due diligence of Autonomy, the DRC also thoroughly investigated, considered and rejected ancillary  
 23 claims related to HP's integration and management of Autonomy after the close of the acquisition,  
 24 *id.* at 37-43; the impairment charge for Autonomy, *id.* at 43-47; and HP's share buy-back program,  
 25

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26 <sup>6</sup> The DRC also found that HP's outside advisors in connection with the Autonomy acquisition, specifically including  
 27 Barclays and Perella Weinberg, had been "guided by reasonable professional judgments based upon reasonable  
 28 assumptions and estimates" and had not acted negligently or in bad faith. DRC Resolution at 58-59. Therefore, the  
 DRC also recommended that no claims be pursued against these advisors. *Id.*

*id.* at 75-76. The DRC concluded that there was no merit to any claim related to the above-listed issues against either HP's officers and directors or its outside advisors. *Id.* at 83-86, 89.<sup>7</sup>

**2. The HP Board Decided Not To Pursue the Claims at Issue Here, and That Decision Is Entitled to Deference.**

On January 10, 2014, the board was presented with the DRC’s resolution containing its written findings and recommendations. The DRC and its counsel also made a presentation to the board on January 15. Board Resolution at 2-3. After considering the DRC’s recommendations and consistent with them, the board resolved on January 16, 2014 that it was not in the best interests of HP and its shareholders to pursue claims against HP’s directors, officers or advisors, including those claims at issue here. *Id.* at 3, 6-9, 11.<sup>8</sup> The board did resolve that claims be pursued against Lynch and Hussain, the architects of the fraud that had been perpetrated, as well as against Deloitte UK. *Id.* at 9-11.

The board’s decision not to pursue claims against HP’s directors, officers and advisors would end this case if it were to proceed. For there can be no question that, in deciding that terminating this litigation was in the best interests of the company, HP’s independent and disinterested “directors acted in an informed manner and with due care, and in a good faith belief that their action was in the best interest of the corporation.” *Copeland*, 2012 WL 4845636, at \*5. The committee was independent; its investigation was thorough; and the board’s reliance on the committee’s judgment is entitled to deference under the business judgment rule. *Scattered*, 701 A.2d at 75-77.

### **3 The Determinations Made by the DBC and the Board Are Reasonable**

The fact that HP's board has acted in good faith and with due care in deciding to terminate

<sup>7</sup> The DRC also found that Whitman's statements on an earnings call on May 23, 2012 and to the media on June 5, 2012 were neither misleading nor incomplete because Whitman believed Autonomy's problems were due to scaling challenges, she had no intent to mislead HP shareholders or the public, and no one yet knew whether the whistleblower's allegations of pre-acquisition accounting improprieties (which were made on May 25—two days *after* Whitman's May 23 statement) were well-founded or the extent or materiality of any such improprieties. DRC Resolution at 42.

<sup>8</sup> At the time of the resolution, HP's board had twelve directors, including three new directors not among the eleven then-current directors named as defendants in plaintiff's complaint. *Compare Compl.* ¶¶ 33-47 with Board Resolution at 4-6. Three directors named as defendants, Meg Whitman, Raymond Lane and Ann Livermore, voluntarily recused themselves from voting on the board's resolution. Board Resolution at 4. A fourth director, Bennett (one of the three non-defendant new directors), also a member of the independent committee, voluntarily recused himself with respect to potential claims against Perella Weinberg. *Id.* at 4.

1 this litigation would be enough to sustain its decision to seek dismissal of this case. But even if it  
 2 were not, the claims would likely fail on the merits. Settlement is highly favored in derivative  
 3 actions because they are ““notoriously difficult and unpredictable.”” *NVIDIA*, 2008 WL 5382544 at  
 4 \*2 (quoting *In re AOL Time Warner S’holder Deriv. Litig.*, No. 02-cv-6302-SWK, 2006 WL  
 5 2572114, at \*3 (S.D.N.Y. Sept. 6, 2006)). And as the Ninth Circuit has explained, “[e]ven if the  
 6 potential recovery might have been large, the odds of winning [a] derivative lawsuit [are] extremely  
 7 small” and such suits are consequently “rarely successful.” *In re Pac. Enterprises Sec. Litig.*, 47  
 8 F.3d 373, 378 (9th Cir. 1995). That is true in this case.

9 HP’s charter contains an exculpation provision pursuant to Section 102(b)(7) of the Delaware  
 10 corporate code, 8 DEL. C. § 102(b)(7), which protects HP’s directors from personal liability for  
 11 breaches of the duty of care. There is no allegation here that any director intentionally wronged the  
 12 corporation in order to advance his or her personal interests. Therefore, to succeed on a claim  
 13 against the directors, a plaintiff would have to prove that the directors breached their duty of loyalty  
 14 because they “fail[ed] to act in the face of a known duty to act, thereby demonstrating a conscious  
 15 disregard for their responsibilities.” *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

16 And if the claim is based on an allegation of lack of director oversight (as it is, for instance,  
 17 in the post-acquisition period), a plaintiff would need to show that the directors either (1) “utterly  
 18 failed to implement any reporting or information systems or controls,” or (2) “having implemented  
 19 such a system or controls, consciously failed to monitor or oversee its operations thus disabling  
 20 themselves from being informed of risks or problems requiring their attention.” *Id.* Claims of this  
 21 type have been described as “possibly the most difficult theory in corporation law upon which a  
 22 plaintiff might hope to win a judgment.” *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 967  
 23 (Del. Ch. 1996). In *Caremark* itself, the “extremely weak” claims that the directors had failed to  
 24 monitor the corporation were settled on the basis of certain corporate governance reforms and  
 25 changes to certain drug referral policies. *Id.* at 972.<sup>9</sup>

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26  
 27 <sup>9</sup> Failure-to-monitor claims against directors and officers are routinely dismissed by the Delaware Court of Chancery  
 28 on the pleadings. See, e.g., *In re Dow Chem. Co. Deriv. Litig.*, No. 4349-CC, 2010 WL 66769, at \*15 (Del. Ch. Jan. 11,

1        Beyond this, under Delaware law, directors are “fully protected in relying in good faith” on  
 2 the managers and advisors of a corporation. *See Brehm v. Eisner*, 746 A.2d 244, 261 (Del. 2000); 8  
 3 DEL. C. § 141(e). To overcome Section 141(e), a plaintiff must allege particularized facts  
 4 demonstrating, for instance, that the board “did not in fact rely on the expert,” or that the “reliance  
 5 was not in good faith,” or even that “they did not reasonably believe that the expert’s advice was  
 6 within the expert’s professional competence.” *Brehm*, 746 A.2d at 261.

7        While these provisions of Delaware law do not apply to HP’s officers, plaintiff would still  
 8 have to prove that the officers acted with gross negligence. *Adams v. Calvarese Farms Maint.*  
 9 *Corp.*, No. 4262-VCP, 2010 WL 3944961, at \*18 (Del. Ch. Sept. 17, 2010); *Midland Grange No. 27*  
 10 *Patrons of Husbandry v. Walls*, 2008 WL 616239, at \*9 (Del. Ch. Feb. 28, 2008). Construing this  
 11 standard, the Delaware courts have held that a would-be plaintiff would have to prove that HP’s  
 12 officers took actions “which [were] without the bounds of reason,” *Adams*, 2010 WL 3944961, at  
 13 \*18, and were “so grossly off-the-mark as to amount to reckless indifference or a gross abuse of  
 14 discretion.” *Metro. Life Ins. Co. v. Tremont Grp. Holdings Inc.*, No. 7092-VCP, 2012 WL 6632681,  
 15 at \*7 (Del. Ch. Dec. 20, 2012); *Solash v. Telex Corp.*, 1988 WL 3587, at \*9 (Del. Ch. Jan. 19, 1988).

16        The overwhelming evidence uncovered by the DRC and reviewed by the board demonstrates  
 17 that these strict standards under Delaware law cannot be met.

18        a. *HP’s Extensive Due Diligence.* The DRC’s investigation found that the pre-acquisition  
 19 “due diligence” conducted by HP was entirely consistent with what is typically conducted for deals  
 20 involving public U.K.-based companies that are subject to the U.K. Takeover Code.<sup>10</sup> HP and its  
 21 numerous accounting, financial, and legal advisors reviewed non-public documents, participated in  
 22 at least 28 due diligence phone calls, and pored over publicly filed Autonomy financial statements  
 23 that had been audited by Deloitte UK. DRC Resolution at 31-32. The board received several

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24  
 25 2010); *David B. Shaev Profit Sharing Account v. Armstrong*, No. 1449-N, 2006 WL 391931 (Del. Ch. Feb. 13, 2006)  
 aff’d, 911 A.2d 802 (Del. 2006); *Guttmann v. Huang*, 823 A.2d 492, 507-08 (Del. Ch. 2003).

26        <sup>10</sup> The U.K. Takeover Code requires a potential target to provide the same nonpublic information to all bona fide  
 27 suitors. DRC Resolution at 31. HP had legitimate concerns that one of Autonomy’s competitors would invoke the U.K.  
 28 Takeover Code to demand any nonpublic information shared by Autonomy executives, with an eye toward disrupting a  
 possible HP acquisition or gaining a competitive advantage over HP if the deal went through. *Id.* These concerns were  
 shared with the HP board. *Id.*

1 updates on the due diligence process, and it ultimately approved the acquisition after HP found no  
 2 material issues in its review and its financial advisors deemed the proposed price to be fair. *Id.* at  
 3 34-35. The board, by statute, was entitled to rely on the advice on these subjects that it received  
 4 from the company's advisors and from management. *See* 8 DEL. C. § 141(e); *Brehm*, 746 A.2d at  
 5 262.

6 HP's management consulted with the board and its committees on numerous occasions and  
 7 convened a substantial team of employees from Corporate Development, Finance, Sales Operations,  
 8 Legal, and several other departments, to spearhead the due diligence. DRC Resolution at 27-28, 31.  
 9 HP also hired best-in-class advisors for the transaction, Barclays and Perella Weinberg, to advise on  
 10 strategy and the fairness of the price. *Id.* at 31. While one fairness opinion is generally more than  
 11 sufficient, in this case, both banks reviewed and opined that the transaction was fair. *Id.* at 54. HP  
 12 also retained two top-tier international law firms, Freshfields and Gibson Dunn, to conduct legal due  
 13 diligence, provide advice on the U.K. Takeover Code, and act as deal counsel, respectively. *Id.* at  
 14 31. In addition, HP retained KPMG to conduct financial and accounting due diligence. *Id.*

15 The HP team collected and scrutinized public information and non-public documents and  
 16 representations supplied by Autonomy executives. *Id.* By the end of the due diligence process,  
 17 Autonomy executives had provided a response to every one of HP's "must have" diligence requests  
 18 except one, access to Deloitte UK's work papers. *Id.* at 32. The materials they had provided  
 19 included the open-source scan of its source code, lists of revenue by product category, redacted  
 20 sample OEM contracts, and redacted lists of top 40 customers and top 40 contracts. *Id.* at 31-32.  
 21 Deloitte UK agreed to a due diligence phone call with the HP team and KPMG as a substitute for  
 22 producing its work papers. *Id.* at 32. The HP team asked the right questions about Autonomy's  
 23 revenue recognition policies, including whether Deloitte UK had had any disagreements with  
 24 Autonomy's management about accounting policies or conclusions, but Deloitte UK failed to  
 25 disclose any disagreements. *Id.*

26 The board also considered dissenting views. As discussed in the DRC resolution, HP's CFO  
 27 Catherine Lesjak expressed concern about the deal during a board meeting. Lesjak stated that, in her  
 28 view, while the strategic vision for the deal was sound, the size of the premium would concern  
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1 shareholders, HP's bankers had underestimated the impact of the acquisition on the stock price, and  
 2 HP had a history of not executing on major acquisitions. She did not state or believe that the  
 3 proposed acquisition of Autonomy placed too high a value on Autonomy. The board took Lesjak's  
 4 concerns seriously and met in executive session to consider them and proceeded only after HP CEO  
 5 Léo Apotheker responded to her concerns to the board. *Id.* at 34. Far from casting doubt upon the  
 6 board's thoroughness and deliberation, the episode demonstrates it.

7 In the end, none of the presentations that the board received from management or its advisors  
 8 identified any material issues or "red flags" concerning Autonomy. *Id.* Management noted that,  
 9 with respect to the finance and accounting areas, KPMG had found "no material issues." *Id.* The  
 10 bankers made separate presentations to the board, and each provided a fairness opinion on August  
 11 18. *Id.* at 35, 54-55. Having taken all this information into account, and having confirmed with the  
 12 CEO his belief that Autonomy would be an important acquisition for HP, the board voted to approve  
 13 the deal. *Id.* at 34-35. The directors breached no fiduciary duty in casting their "yes" votes. They  
 14 had actively monitored the thorough due diligence of Autonomy conducted by HP's managers and  
 15 advisors. They could not have known they were being deceived by Autonomy executives.

16 b. *The Problem: Autonomy's Executives Lied.* HP did not miss the fraud at Autonomy  
 17 because it wasn't diligent enough. The problem was that Autonomy executives had lied.  
 18 Repeatedly. The audited financials that were publicly filed every year, and the published quarterly  
 19 financials that were reviewed by Deloitte UK, together with the narrative in the annual reports that  
 20 accompanied the numbers, were riddled with misrepresentations and outright falsehoods. Revenue,  
 21 excluding hardware, was lower than reported by 21.1% in 2009, 29.6% in 2010, and 26.4% in the  
 22 first half of 2011. Operating margins were overstated by allocating a portion of the loss associated  
 23 with those sales to SG&A. Revenue growth was overstated by the inclusion of phony software deals  
 24 and loss making hardware sales in every period; for example, revenue growth in 2010 was reported  
 25 to be 17.7% but was actually only 5% when the phony software and hardware deals are excluded.  
 26 DRC Resolution at 24-25.

27 In its 2010 Annual Report, Autonomy was described as a pure software company with almost  
 28 90% gross margins. The Annual Report stated that 400 OEM customers included IDOL in their

1 software, which would lead to a steady stream of high gross margin royalties. Wolinsky Decl. Ex. 4  
 2 at i, 15-16 (“Annual Report”). None of this was true. The DRC found that the annual report had  
 3 failed to disclose that (1) Autonomy executives had used phony VAR transactions to enable  
 4 premature and/or unwarranted recognition of revenue and often “round-tripped” transactions to  
 5 provide VARs with cash to pay for licenses, (2) many supposed OEM transactions either had been  
 6 improperly classified or had not involved the embedding of Autonomy’s IDOL software, (3) hosting  
 7 contracts had been modified to recognize the revenue up-front rather than pro rata at the expense of  
 8 long-term revenue streams and, at times, at the expense of total contract revenue, (4) Autonomy  
 9 executives had entered into loss-making pure hardware sales to pump up revenue and close gaps at  
 10 the end of the quarter, labelling the hardware sales as software revenue, and (5) Autonomy  
 11 executives had inflated gross margins by allocating a large portion of the costs from those loss-  
 12 making hardware sales to sales and marketing (which does not affect gross revenue), rather than to  
 13 cost of goods sold (which does). DRC Resolution at 36.

14 Autonomy executives continued their campaign of deceit throughout HP’s due diligence  
 15 process. Again and again, they made misrepresentations to HP in response to questions that, had  
 16 they been answered truthfully, would have exposed their fraud. HP asked detailed questions  
 17 respecting, among other things, financial information, revenue projections, growth rates, and gross  
 18 margins. *Id.* at 31. Not only did Autonomy executives fail to disclose any of their inappropriate  
 19 accounting practices, they affirmatively told HP that the public financials were accurate. Hussain  
 20 confirmed the assumptions that HP had embedded in its valuation model, assumptions derived from  
 21 the public financials. *Id.* at 32. Hussain also signed off on sharing lists of top 40 contracts and  
 22 customers that included improperly recognized revenue from VAR transactions and revenue  
 23 misclassified as OEM revenue. (More on that below, pp. 20-21).

24 HP was also misled by the information provided—or, more precisely, not provided—by  
 25 Deloitte UK. On the August 17, 2011 due diligence call with HP and KPMG, Deloitte UK  
 26 dismissively noted that a whistleblower had come forward in the past, but failed to tell HP and  
 27 KPMG that the individual was Autonomy’s then-CFO for the Americas. DRC Resolution at 32.  
 28 Deloitte UK failed to disclose the seriousness and extent of the allegations made, and of the concerns

that the executive had, which have since been shown to have been well-founded. *Id.* And Deloitte UK did not disclose that it had long-running disagreements with Autonomy management over accounting practices at Autonomy. *Id.*

c. *Lynch’s and Hussain’s Attempt to Shift the Blame: The Post-Acquisition Period.* When HP disclosed that it had been deceived, Autonomy’s former leadership was quick to accuse HP of fumbling in the post-acquisition period—what else was there for Lynch and Hussain to say? Various shareholders leveled claims based on those allegations. The DRC, however, thoroughly investigated, considered and rejected the notion that HP’s integration and management of Autonomy after the close of the acquisition was the real cause of revenue shortfalls at Autonomy, *see* DRC Resolution at 37-43; that there was anything improper in the amount or manner in which HP recorded an impairment charge for Autonomy, *see id.* at 43-47; and that there was anything improper with the share buy-back program that HP conducted after the Autonomy acquisition closed, *see id.* at

• 10 •

In short, the DRC concluded that HP's losses didn't result from any lack of diligence on HP's part but from the extraordinary extent to which Lynch and Hussain lied, and the extraordinary extent to which Deloitte UK negligently certified financial statements riddled with inaccuracies. And it concluded that Lynch and Hussain's accusation that the problem was HP's handling of the integration is just a tactic intended to distract from their own wrongdoing. And so the DRC and the board rightly concluded that the derivative claims asserted here are meritless, and that it would not be in HP's best interest to pursue them. The release contemplated in the proposed settlement therefore is entirely fair to the corporation.

## B. The Proposed Corporate Governance Reforms Are Beneficial to HP.

The corporate governance reforms contemplated in the settlement are valuable to the corporation and its shareholders. These reforms include the following:

- Closer alignment between the board and HP's Finance and Investment Committee: The HP Board of Directors will work more closely with the Finance and Investment

1 Committee (“FIC”), which has been responsible for M&A oversight. The reforms call on  
 2 the Board to ensure that the FIC is composed of members with significant M&A  
 3 experience, to discuss potential transactions before the FIC provides approval to sign, and  
 4 to review the FIC’s decisions regarding approval to sign for large transactions.

- 5 ➤ Increased responsibilities for the FIC: The FIC will advise the Board regarding the  
 disclosure protocols of M&A transactions, conduct a yearly process review to evaluate  
 implemented and planned improvements to the M&A process, and ensure that M&A due  
 diligence and related processes have been properly preserved.
- 6 ➤ Increased depth of involvement by HP’s Management Executive Committee (EC) in the  
 evaluation of acquisition targets: The EC will review and recommend changes where  
 necessary to the criteria developed by the business units to evaluate the attractiveness of  
 potential transaction targets. The EC’s recommendations will be reviewed by the Board  
 of Directors and the FIC for approval.
- 7 ➤ Formal training for employees without M&A expertise: Non-M&A professionals  
 involved in the transaction process will be given training that is given to M&A  
 professionals. In addition to this training, the reforms call for training with respect to  
 appropriate revenue recognition practices for all employees of newly acquired companies  
 dealing with certain business functions.
- 8 ➤ Greater oversight of due diligence by HP’s Risk Management Committee: HP’s Risk  
 Management Committee (“RMC”) will review important due diligence findings, be  
 available as a point of escalation for identified risks, and ensure that all elevated risks are  
 properly resolved or further investigated. The RMC will also have three permanent  
 members, including the Chief Financial Officer, the General Counsel and the Director of  
 Corporate Development.
- 9 ➤ Additional focus on due diligence for acquired technology: For larger transactions, a  
 written technology due diligence plan that is specific to the particular transaction being  
 evaluated will be approved by a Technology Committee.
- 10 ➤ Adoption of a formal fairness opinion policy: HP’s fairness opinion policy will require

1 consideration of whether a potential transaction can be deemed fair from a financial  
 2 perspective and the evaluation any facts or circumstances that might compromise the  
 3 independence of an advisor.

4 These are significant reforms that justify approval of the settlement. As the case law makes  
 5 clear, governance reforms achieved in the settlement of derivative litigation “provide valuable  
 6 benefits” to corporations and their shareholders.” *Wixon v. Wyndham Resort Development Corp.*,  
 7 No. C 07-2361 JSW, 2010 WL 3630124, at \*3 (N.D. Cal. Sept. 14, 2010) (quoting *NVIDIA*, 2008  
 8 WL 5382544, at \*3). And that is because, as this Court has recognized, “strong corporate  
 9 governance is fundamental to the economic well-being and success of a corporation.” *NVIDIA*, 2008  
 10 WL 5382544, at \*3 (granting preliminary approval of settlement where corporate governance  
 11 reforms “provide[d] valuable benefits” to the Company). As a result, courts have routinely approved  
 12 settlements providing only for governance reforms without monetary relief.<sup>11</sup>

## 13 **II. THE MOTIONS TO INTERVENE AND SEVER SHOULD BE DENIED.**

14 Also before the Court are motions to intervene by Cook and Hussain, and a motion to sever  
 15 by Steinberg and Vogel. In order to intervene as of right, a proposed intervenor must show, among  
 16 other things, that his interests are not “adequately represented by existing parties.” *Arakaki v.*  
 17 *Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Permissive intervention should be denied if the  
 18 proposed intervenors lack “standing to raise relevant legal issues,” or if their “interests are  
 19 adequately represented by other parties,” or if intervention will fail to “significantly contribute ... to  
 20 the just and equitable adjudication of the legal questions presented,” or if it “will prolong or unduly  
 21 delay the litigation.” *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)  
 22 (Kennedy, J.). Neither Cook nor Hussain can meet either standard for intervention, and their  
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24 <sup>11</sup> See, e.g., *Wixon*, 2010 WL 3630124, at \*2; *In re Johnson & Johnson Deriv. Litig.*, 900 F. Supp. 2d 467, 485 (D. N.J.  
 25 2012); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 853 (E.D. Mo. 2005) (“Where the corporate governance reforms are  
 26 achieved independently of any monetary benefits, the therapeutic benefits are even more worthwhile”); *In re Rambus Inc. Deriv. Litig.*, No. C 06-3513 JF (HRL), 2009 WL 166689, at \*3 (N.D. Cal. Jan. 20, 2009) (“In the instant case, the  
 27 Court is satisfied that the corporate governance reforms are of significant value to [the company]”); *Mohammed v. Ellis*,  
 28 No. 12-cv-1831, 2014 WL 4212687, at \*3 (D. Colo. Aug. 26, 2014) (“The fact that the settlement involves only corporate  
 governance reforms ... does not weigh against approval of the settlement. To the contrary, the corporate governance  
 reforms ... are specifically and appropriately designed to prevent the recurrence of the alleged misconduct ....”).

1 motions should be denied. In addition, there is no reason to sever Steinberg’s demand-refused case  
 2 at this time because the proposed settlement, if approved, would release the claims asserted in her  
 3 complaint.

4       **A. Cook and Steinberg**

5 Cook’s motion must be denied under the well-established rule that shareholders cannot  
 6 intervene to challenge the terms of a proposed settlement when they may freely “exercis[e] their  
 7 rights as objectors under Rule 23.1.” *In re Bank of Am. Corp. Sec., Deriv. & ERISA Litig.*, No. 09-  
 8 md-2058-PKC, 2012 WL 1674299, at \*3 (S.D.N.Y. May 14, 2012).<sup>12</sup> The questions that Cook  
 9 raises in his moving papers—about the lack of monetary recovery by HP, *see* Cook Motion at 3-4  
 10 (Docket No. 172)—go to “the settlement’s ultimate fairness and adequacy,” and thus “are best  
 11 weighed alongside those of other likely objectors” at the final approval hearing. *Bank of Am. Corp.*,  
 12 2012 WL 1674299, at \*2; *see also In re Johnson & Johnson Deriv. Litig.*, 900 F. Supp. 2d at 478  
 13 (denying permissive intervention where proposed intervenor “seeks to assert the rights of [the  
 14 company]” whose interests were already adequately represented). Cook’s motion for intervention,  
 15 either as of right or permissive, should be denied.

16 Steinberg too can protect her interests by objecting. She argues that her demand-refused case  
 17 should be severed from lead plaintiff’s demand futility case, but the fact that she made a demand is a  
 18 distinction without a difference, given that the parties have agreed to a settlement that is now pend-  
 19 ing Court approval and, if this litigation were to proceed, HP would move to dismiss the case based  
 20 on the board’s determination that the suit is not in the company’s best interests. The proposed set-  
 21 tlement would release all the claims asserted in her lawsuit. Therefore, as a substantive matter, even  
 22 if Steinberg’s case were severed now, there would be no litigation for her to prosecute.  
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 26       <sup>12</sup> *See also Athale v. Sinotech Energy Ltd.*, No. 11-cv-5831-AJN, 2013 WL 2145588, at \*2 (S.D.N.Y. May 16, 2013)  
 27 (denying intervention as of right); *Davis v. J.P. Morgan Chase & Co.*, 775 F. Supp. 2d 601, 605 (W.D.N.Y. 2011); *In re Motor Fuel Temperature Sales Practices Litig.*, MD-1840-KHV, 2011 WL 5331678, at \*2 (D. Kan. Nov. 4, 2011); *accord UAW v. Gen. Motors Corp.*, No. 05-cv-73991-DT, 2006 WL 334283, at \*5 (E.D. Mich. Feb. 13, 2006) (denying permissive intervention); *Athale*, 2013 WL 2145588, at \*3.

1                   **B. Hussain**

2                   Hussain’s motion is even more flawed than Cook’s and Steinberg’s. As someone facing  
 3 potential criminal and civil charges for the fraud he perpetrated upon HP, he is the last person to  
 4 whom the Court should give credence in the context of a derivative action brought to protect HP’s  
 5 interests.

6                   **1. Hussain Failed to Identify a Claim He Wishes To Pursue or File a  
 7 Proposed Pleading as Required by Rule 24(c).**

8                   Hussain’s first problem is that he failed to comply with the plain terms of Fed. R. Civ. P.  
 9 24(c). Rule 24(c) provides that an intervention “motion *must* ... be accompanied by a pleading that  
 10 sets out the claim or defense for which intervention is sought.” (Emphasis added.) When a pleading  
 11 is not attached, “the movant [must] describe[] the basis for intervention with sufficient specificity to  
 12 allow the district court to rule” on the motion to intervene. *Beckman Indus., Inc. v. Int’l Ins. Co.*,  
 13 966 F.2d 470, 475 (9th Cir. 1992). Hussain cannot meet this basic requirement because he does not  
 14 even identify a claim he seeks to bring or defense he wishes to assert. That alone is sufficient  
 15 grounds to deny his motion. *E.g., Kremen v. Cohen*, No. 5:11-CV-05411-LHK, 2012 WL 2919332,  
 16 at \*9 (N.D. Cal. Jul. 17, 2012) (“Movant’s failure to attach a pleading not only renders his motion to  
 17 intervene procedurally deficient, but moreover deprives the Court of a basis for determining whether  
 18 it has an independent basis ... over Movant’s claims or defenses”).

19                   This is not just attributable to lawyer oversight. If Hussain did submit a pleading and make  
 20 affirmative statements, he would make admissions that could be used against him in the event he is  
 21 indicted. And in any event, there is no purpose to be served in having him intervene in a case that  
 22 the parties have agreed to settle.

23                   **2. Hussain’s Status as a Shareholder.**

24                   Hussain’s second problem arises under a basic principle of corporate law. Since he  
 25 apparently is seeking to intervene as a plaintiff in a derivative action, he must have standing to act as  
 26 a plaintiff. And it is axiomatic that, to have standing to serve as a derivative plaintiff, Hussain has to  
 27 show that he was “a stockholder at the time of the alleged wrong” and that he “maintain[ed]  
 28 shareholder status throughout the litigation.” *Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75

1 A.3d 888, 894 (Del. 2013) (reaffirming continuous-ownership rule after answering certified question  
 2 from the United States Court of Appeals for the Ninth Circuit).

3 Hussain has not submitted anything to establish that he was a stockholder at the time of HP's  
 4 acquisition of Autonomy, or that he is an HP stockholder now. All he says is that, at some point in  
 5 the past, HP granted him restricted stock units. That grant took place on November 16, 2011, *after*  
 6 the Autonomy transaction closed,<sup>13</sup> and so the contemporaneous-ownership rule deprives him of  
 7 standing to prosecute any claims on behalf of HP relating to that transaction. Under the terms of the  
 8 grant, his right to receive unvested shares ended when he left HP. Wolinsky Decl. Ex. 5 at ¶ 7 (if  
 9 employment is terminated before the lapse of the restriction period all unvested RSUs "shall be  
 10 forfeited"). And while his vested RSUs were converted to shares, Hussain has never claimed that he  
 11 held them when this action was commenced, or that he is a current shareholder.

12 Obviously, Hussain knows what his holdings are, and could easily clear up any questions  
 13 about them. And on August 27, HP gave Hussain the opportunity to do just that: it sent his counsel  
 14 a letter asking for simple proof of his shareholder status. Hussain rejected the request out of hand,  
 15 refusing to provide *any* information unless HP would agree to disclose the documents he seeks  
 16 through his motion to intervene.<sup>14</sup> Hussain puts the cart before the horse.

### 17           **3. Hussain Is No Champion of the Interests of HP and Its Stockholders.**

18 The third problem with Hussain's motion for intervention is that his interests are adverse to  
 19 those of HP and its stockholders. Courts around the country hold that shareholders can object only if  
 20 they have standing to file derivative litigation in the first place. At a minimum, this means Hussain  
 21 must show that his interests are not "antagonistic to those [he] is seeking to represent." CHARLES  
 22 ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, AND ADAM N.  
 23 STEINMAN, 7C FEDERAL PRACTICE AND PROCEDURE § 1833 (3d ed. 2014). Although the Ninth  
 24 Circuit has stopped short of holding that objectors must have standing to sue (leaving the question  
 25 for another day), it, too, has cautioned that objectors cannot have interests that are "hostile" to those

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 27           <sup>13</sup> Wolinsky Decl. Ex. 5 (Stock Notification and Award Agreement).  
 28           <sup>14</sup> Wolinsky Decl. Exs. 6, 7.

1 of other shareholders. *Zarowitz v. BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989). Here,  
 2 there can be no doubt that Hussain’s interests are “antagonistic” and “hostile” to those of HP and its  
 3 shareholders. He committed a massive fraud. He is the subject of criminal investigations into that  
 4 fraud (investigations with which HP has cooperated, and will continue to cooperate). And on the  
 5 basis of the year-long DRC investigation, he is about to be sued for that fraud.

6 The evidence uncovered by HP and the DRC makes abundantly clear how the interests of  
 7 HP, as the victim of fraud, and Hussain, a principal perpetrator of that fraud, inescapably conflict.  
 8 One central element of the fraud Hussain orchestrated involved phony software license deals similar  
 9 to the sort that this Court became familiar with in the *Informix* case, in which the company’s CEO  
 10 pleaded guilty to fraud for entering into secret side deals with purchasers of software licenses as part  
 11 of a scheme to inflate his company’s revenues.<sup>15</sup> What Autonomy executives did was to enter into  
 12 illusory agreements to sell Autonomy software to value-added resellers, or “VARs.” They would  
 13 immediately recognize revenue from those transactions, even if the VARs did not have an end-user  
 14 lined up to purchase the software and could not be and were not expected to pay the amounts owed  
 15 to Autonomy.

16 One particularly egregious VAR transaction was born of the unsuccessful attempts of  
 17 Autonomy executives to sell software to the Vatican for use in digitizing the Biblioteca Apostolica  
 18 Vaticana (“Vatican Library” or “BAV”). When negotiations with the Vatican Library stalled,  
 19 Autonomy executives sold the software to a VAR called MicroTech on March 31, 2010, the last day  
 20 of the first quarter of the fiscal year. They booked \$11 million of revenue from that sale.  
 21 Autonomy’s records listed the BAV as the intended end-user of the software. But that was a lie.  
 22 MicroTech made no effort to sell the software, and had no contact with the BAV. And Autonomy  
 23 executives never sold any software to the BAV, either. The transaction was fake, and the revenue  
 24 was fake.

25 Bizarrely, four years later, after HP had blown the whistle on the fraud at Autonomy and

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 27     <sup>15</sup> See *United States v. White*, No. 02-cr-0375-CRB (N.D. Cal. May 26, 2004); Securities and Exchange Comm’n, *In*  
       *the Matter of Informix Corp.*, No. 3-10130, Order Instituting Public Administrative Proceedings, Making Findings, and  
       Imposing a Cease-and-Desist Order (Jan. 11, 2000).

1 after the Vatican Library had announced that it had hired a different vendor for its digitization  
 2 project, MicroTech sent a letter to the Vatican to inquire about the “project between the [Vatican]  
 3 Biblioteca and Autonomy.” Wolinsky Decl. Ex. 8. The VAR wrote: “In March 2010, MicroTech  
 4 was requested by Autonomy to participate as a reseller in an ongoing project. ... As part of that  
 5 project, MicroTech purchased ... (\$11,550,000) worth of [Autonomy] software.” The VAR sought  
 6 to “confirm your receipt and use of the software and to obtain payment for that use.” *Id.*

7 Monsignor Cesare Pasini of the BAV responded that the BAV “has never dealt with the  
 8 company MicroTech and was not even aware of its involvement with Autonomy at the time.”  
 9 Wolinsky Decl. Ex. 9. He noted that the BAV’s discussions with Autonomy had ended in 2011. In  
 10 other words, the Vatican had never heard of MicroTech, never dealt with MicroTech, and never  
 11 agreed to purchase the \$11.5 million of Autonomy software recognized by Autonomy executives  
 12 back in the first quarter of 2011. Moreover, the Vatican had interacted only with Autonomy  
 13 executives, not MicroTech, even though the software had already supposedly been sold to  
 14 MicroTech for the Vatican’s use.

15 The fraudulent Vatican deal surfaced as one element of the fraud perpetrated by Hussain on  
 16 HP in due diligence. In response to a request, Autonomy executives prepared a list of their top 40  
 17 contracts. The unredacted list, which was circulated among Lynch, Hussain, COO Andrew Kanter,  
 18 and VP of Finance Steve Chamberlain on August 4, 2011, identified the fourth largest customer as  
 19 MicroTech with a value of \$11.55 million. A separate column titled “end user (if diff)” listed the  
 20 BAV, and the “Services” was classified as “European Govt.” Wolinsky Decl. Ex. 10.

21 Hussain knew that Autonomy had never transacted with the BAV. Nonetheless, he approved  
 22 the list and instructed Kanter to redact the list and place it in the data room that had been created to  
 23 facilitate HP’s due diligence. Moreover, in a clear indication that Hussain and other Autonomy ex-  
 24 ecutives deliberately tried to hide from HP the fact that many of the top “customers” were actually  
 25 VARs, they deleted the entire “end user (if diff)” column, including the “end user (if diff)” heading  
 26 itself. As a result, on the redacted top 40 contracts list shared with HP, line 4 stated only: “value:  
 27 \$11,550[,000]” and “Industry: European Govt.” Wolinsky Decl. Ex. 11.

#	Customer	End user (if diff)	Value (ex services) \$	Services
1	Bank of America		22,509	Bank
2	UBS		19,919	Bank
3	BP	Direct	14,200	Energy
4	Microtech	BAV	11,550	European Govt
5	KPMG	Direct	11,337	Professional Services
6	Filetek	VA	10,500	US Government
7	Prisa	Direct	9,663	Media

*Unredacted version of top 40 contracts list not shared with HP (above);  
Misleadingly redacted version shown to HP (below)*

#	Customer	Value (ex pro serv)		Industry
		\$'000		
1		✓22,509		Bank
2		✓19,919		Bank
3		14,200		Energy
4		11,550		European Govt
5		11,337		Professional Services
6		10,500		US Government
7		9,663		Media

Therefore, line 4 of the redacted top 40 contracts list contained two misrepresentations: Autonomy executives lied about whether there was ever any sale to the Vatican at all, and also concealed the fact that there were resellers involved in these major contracts. Other deals on the top-40 list were fake as well.

And the list itself is just the tip of the evidentiary iceberg that shows how Hussain is the fraudster, HP is the victim—and thus that their interests are diametrically opposed.

### C. To the Extent Hussain Has Any Cognizable Interest in the Settlement, It Is Protected.

Plainly, Hussain has no cognizable interest in challenging a settlement that grew out of an HP board decision to sue him. Hussain's claimed interest in terms of the bar order is equally fatuous.

The bar order in the proposed final order approving the settlement provides Hussain and other potential defendants the full value of any contribution claims they might have, without having to bring those claims. Thus, the bar order reduces Hussain's liability with a judgment credit that "corresponds to the percentage of responsibility of the applicable Releasee(s) for the loss to the

1 Company or Autonomy.” Proposed Order Approving Settlement and Judgment, ¶13(a) (Docket No.  
 2 201-3, at 7-8). “This constitutes very significant compensation to [Hussain], in light of the  
 3 perception by the underlying plaintiffs and [HP] that [Hussain] was a central figure in the  
 4 violations.” *In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 866 (11th Cir. 2009). Bar orders of  
 5 this sort are standard fare in “partial settlements,” where plaintiffs settle with some defendants but  
 6 not others, and they have been upheld time and again. *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th  
 7 Cir. 1989); *HealthSouth*, 572 F.3d 854; *Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297 (2d Cir.  
 8 2003) (Sotomayor, J.).

9 Hussain’s challenge to the efficaciousness of the clause is without substance. As an initial  
 10 matter, Hussain has no claim for contribution against any HP officer or director. In an action for  
 11 fraud under English law, Hussain would not be able to defend on the basis that the people he  
 12 defrauded contributed to their victimization by conducting negligent due diligence. *Standard*  
 13 *Chartered Bank v. Pakistan Nat'l Shipping Corp. (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 A.C.  
 14 959 at 965-67 ¶¶ 11-18 (H.L. Eng.) (Lord Hoffmann) (Wolinsky Decl. Ex. 12). Thus, to the extent  
 15 Hussain is being barred from asserting a claim, for example, against an HP executive for negligently  
 16 relying upon Hussain’s misrepresentations, it is a bar that has no financial consequence to him.

17 Hussain’s (false) claim that HP management is responsible for running Autonomy into the  
 18 ground post-acquisition also has no bearing on Hussain’s liability. Under English law, damages for  
 19 fraud are limited to losses directly flowing from the misrepresentations (and would not therefore  
 20 include avoidable losses caused by any purported post-acquisition failings by HP). It is for that  
 21 reason that damages are measured as of the time the fraud was completed, here, when HP’s  
 22 subsidiary closed on the Autonomy acquisition. *Smith New Court Secs. Ltd. v. Scrimgeour Vickers*  
 23 (*Asset Mgmt.*) *Ltd.* [1997] A.C. 254 at 266-67 (H.L. Eng.) (Lord Browne-Wilkinson) (Wolinsky  
 24 Decl. Ex. 13). As a result, Hussain is not liable for, and therefore could not seek contribution from,  
 25 any HP officer or director for any harm he or she supposedly caused Autonomy through any  
 26 negligence after the deal closed.

27 And Hussain is equally off-base when he claims that the judgment reduction credit is illusory  
 28 because the settlement states that the directors and officers admit no wrongdoing. In defending a

1 suit brought by the company, Hussain would have the opportunity to affirmatively establish that one  
 2 of the directors or officers released by the settlement was responsible for a certain percentage of the  
 3 losses suffered by the company in connection with Autonomy. Hussain's own liability would be  
 4 reduced by any such percentage, *e.g.*, if he establishes that releasees were responsible for 20 percent  
 5 of the loss, he would owe 80 percent of money damages. The fact that the settling directors and  
 6 officers do not admit wrongdoing in the settlement stipulation does not bar Hussain from trying to  
 7 establish otherwise for the purpose of obtaining a judgment credit.

8 **III. CONCLUSION**

9 For the foregoing reasons, lead plaintiff's motion for preliminary approval of the proposed  
 10 settlement should be granted, and Hussain and Cook's respective motions to intervene, and  
 11 Steinberg and Vogel's motion to sever, should be denied.  
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